INTERVIEW SUMMARY

On May 28, 2004, the undersigned had a telephone discussion with Examiner Thomas Beach concerning paragraph 8 of the May 19, 2004 Office Action, which states: "The claims set forth a combination of a plurality of ramps that are capable of being placed next to an obstruction and not the combination of the ramp and the roadway and obstruction." The undersigned and the Examiner also discussed the references cited by the Office. No resolution was reached with respect to the allowability of the claims.

Additionally, the undersigned identified that the Office yet again failed to acknowledge that it considered the evidence of secondary considerations of non-obviousness submitted by Applicants on August 5, 2002. The Examiner suggested that when responding to the latest Office Action, the Applicant should specifically request that the Office acknowledge that it considered the evidence of secondary considerations of non-obviousness already made part of the record, so as to ensure that the Office considers all the evidence before it before issuing any additional Office Actions.

REMARKS / ARGUMENTS

Claims 25 – 33, 35 – 37, 39 and 42-48 are pending in this Application. Claims 28, 31, 33, 37, 42-48 are withdrawn from consideration. Claims 25, 26, 27, 29, 30, 32, 35, 36 and 39 are the only claims currently being presented for consideration by the Office.

The Office rejected claims 25, 32 and 35 under 35 U.S.C. 102(b) as being anticipated by US Patent No. 4,373,306 to Rech ("Rech '306"). "To anticipate a claim, a prior art reference

must disclose every limitation of the claimed invention, either explicitly or inherently." *In re Schreiber*, 128 F.3d 1473, 1477 (Fed. Cir. 1997).

In view of the Office's Response to Arguments as stated paragraph 8 of the May 19, 2004 Office Action, Applicant amended Claim 25 to more positively recite the combination of the ramp and the roadway and obstruction. Thus, claim 25 as currently amended, recites "**In combination**, a roadway under construction **and** a temporary protective ramp removably disposed **on** the roadway under construction . . . .". (emphasis added). Claim 25 further recites that the roadway under construction has "a roadway surface under construction **and** an obstruction elevated above the roadway surface under construction at a height corresponding to an expected elevation of a finished roadway surface upon completion of construction." (emphasis added). Claim 25 further recites that the temporary protective ramp is "removably disposed **adjacent** the elevated obstruction."

Additionally, claim 25 was amended by striking certain functional language, such as "adapted for . . ." and "whereby in use . . ." to enable the more positive recitation of the structural or positional relationship between the temporary ramp, road surface under construction and the elevated obstruction. Specifically, claim 25 now positively recites that the base of the ramp segment is "**contacting**" with the roadway surface under construction and that the first edge of the ramp segment is positioned "**adjacent**" the elevated obstruction such that the sloped upper ramp surface provides a transition from the roadway surface under construction to the elevated obstruction to enable vehicles traveling on the roadway surface under construction to ride up and over the elevated obstruction without damage.

Rech '306 is completely devoid of any mention or reference of a roadway surface under construction. Therefore, Rech '306 does not disclose a roadway under construction **in combination** with a temporary protective ramp "removably disposed **on** the roadway under construction" as now claimed by applicant. Furthermore, because Rech '306 does not even mention a roadway under construction, it certainly does not disclose the additional claim recitations requiring that the roadway under construction has "a roadway surface under construction **and** an obstruction elevated above the roadway surface under construction at a height corresponding to an expected elevation of a finished roadway surface." Nor does Rech '306 disclose a temporary protective ramp having a first edge "disposed **adjacent** the elevated obstruction" with the base of the ramp segment "**contacting** the roadway surface under construction." Rather, Rech '306 simply discloses "duckboard" comprising interlockable "structural elements" (which may be flat or sloped) and identifies that the duckboard may be "used, for example, on an airplane runway or in a factory yard as a track for wheeled vehicles." Col. 2, lines 17-19.

Accordingly, because Rech '306 fails to disclose each and every limitation of claim 25, as amended, either explicitly or inherently, the Office's 102(b) rejection of claim 25 based on Rech '306 is improper and must be withdrawn. For the same reasons, the Office's 102(b) rejection of claims 32 and 35 which depend from independent claim 25 must also be withdrawn.

The Office also rejected claims 25, 32 and 35 under 35 U.S.C. 102(b) as being anticipated by US Patent No. 5,777,266 to Herman ("Herman '266"). As with Rech '306, Herman '266 is completely devoid of any mention of a roadway under construction. Thus, Herman '266 does not disclose a roadway under construction **in combination** with a temporary

protective ramp "removably disposed **on** the roadway under construction" as now claimed by applicant. Furthermore, because Herman '266 does not even mention a roadway under construction, it certainly does not disclose the additional claim recitations requiring that the roadway under construction has "a roadway surface under construction **and** an obstruction elevated above the roadway surface under construction at a height corresponding to an expected elevation of a finished roadway surface." Nor does Herman '266 disclose a temporary protective ramp having a first edge "disposed **adjacent** the elevated obstruction" with the base of the ramp segment "**contacting** the roadway surface under construction." Rather, Herman '266 simply discloses a "modular cable protection system" comprising interlockable structural elements (which may flat or sloped) for preventing tripping hazards by pedestrians and/or to prevent damage to electrical cables, fluid hoses, data cables, and the like, positioned on the ground or extending across walkways and site roads. *See* Col. 1, lines 11-16; Col. 2, lines 48-51.

Accordingly, because Herman '266 fails to disclose each and every limitation of claim 25, as amended, either explicitly or inherently, the Office's 102(b) rejection of claim 25 based on Herman '266 is improper and must be withdrawn. For the same reasons, the Office's 102(b) rejection of claims 32 and 35 which depend from independent claim 25 must also be withdrawn.

The Office rejected claims 26 and 27 under 35 U.S.C. § 103(a) as being unpatentable over Rech '306 or Herman '266 in view of U.S. Patent No. 5,535,470 to Barnowski ("Barnowski '470"). Specifically, the Office asserts that Barnowski discloses that ramp slopes of 1:12 and 1:20 are "'conventional' and thus notoriously well known in the art." The Office then concludes that it would have been obvious to one of ordinary skill in the art to modify Rech '306 and Herman '266 as taught by Barnowski '470 to provide a ramp angle of 1:20.

When making an obviousness determination, the Examiner must consider the claimed invention as a whole, including the distinguishing features of Applicant's invention over the prior art and the advantages achieved by Applicant's claimed invention over the prior the prior art. *In re Wright*, 848 F.2d 1216, 6 U.S.P.Q.2d 1959 (Fed. Cir. 1988) ("The entirety of a claimed invention, including the combination viewed as a whole, the elements thereof, and the properties and purpose of the invention, must be considered.") *overruled on other grounds by*, *In re Dillon*, 919 F.2d 688, 16 U.S.P.Q.2d 1897 (Fed. Cir. 1990). "In proceedings before the Patent and Trademark Office, the Examiner bears the burden of establishing a *prima facie* case of obviousness based upon the prior art." *In re Fritch,* 972 F.2d 1260, 1265, 23 U.S.P.Q.2d 1780, 1783 (Fed. Cir. 1992); 35 U.S.C. § 132.

The issue with respect to the allowability of claim 26, as amended, is not whether it is obvious to provide a 1:20 sloped ramp comprising interlocking ramp segments. Rather, as identified above, the issue is whether there is a motivation to combine the references of Rech '306, Herman '266 and Barnowski '470 and whether that combination discloses, teaches or suggests the invention as a whole as claimed by the Applicant. As with Rech '306 and Herman '266, Barnowski '470 is completely devoid of any mention of a roadway under construction. Thus, Barnowski '470 does not disclose a roadway under construction **in combination** with a temporary protective ramp "removably disposed **on** the roadway under construction" as now claimed by Applicant. Furthermore, because Barnowski '470 does not even mention a roadway under construction, it certainly does not disclose the additional claim recitations of claim 25 requiring that the roadway under construction has "a roadway surface under construction **and** an obstruction elevated above the roadway surface under construction at a height corresponding to an expected elevation of a finished roadway surface." Nor does Barnowski '470 disclose a temporary protective ramp having a first edge "disposed **adjacent** the elevated obstruction" with

the base of the ramp segment "**contacting** the roadway surface under construction.". Accordingly, none of the references cited by the Office disclose, teach or suggest the invention as now claimed in amended claim 25, from which dependent claims 26 and 27 ultimately depend. Thus, the Office's 103(a) rejection of claims 26 and 27, which depend from claim 25, must be withdrawn.

The Office rejects claims 29, 30, 36 and 39 under 35 U.S.C. § 103(a) as being unpatentable over Rech '306 or Herman '266 and Barnowski '470 in view of "Haskins 5,535,470"[1]. The issue with respect to the allowability of claim 29, as amended, is not whether it is obvious to provide a 1:20 sloped ramp comprising interlocking first and second ramp segments. Rather, as identified above, the issue is whether there is a motivation to combine the references of Rech '306, Herman '266 and Barnowski '470 and Haskins '937 and whether that combination discloses, teaches or suggests the invention as a whole as claimed by the Applicant. As with Rech '306, Herman '266 and Barnowski '470, Haskins '937 is completely devoid of any mention of a roadway under construction. Thus, Haskins '937 does not disclose a roadway under construction **in combination** with a temporary protective ramp "removably disposed **on** the roadway under construction" as now claimed by Applicant. Furthermore, because Haskins '937 does not even mention a roadway under construction, it certainly does not disclose the additional claim recitations of claim 25 requiring that the roadway under construction has "a roadway surface under construction **and** an obstruction elevated above the roadway surface under construction at a height corresponding to an expected elevation of a finished roadway surface."

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[1] The Office identified the Haskins reference as having patent number 5,535,470 – the same as Barnowski '470. *See Office Action at Page 5.* It is assumed that the Office simply made a typo and that any reference by the Office to "Haskins" is in reference to U.S. Patent No. 5,446,937 ("Haskins '937").

Nor does Haskins '937 disclose a temporary protective ramp having a first edge "disposed **adjacent** the elevated obstruction" with the base of the ramp segment "**contacting** the roadway surface under construction." Accordingly, none of the references cited by the Office disclose, teach or suggest the invention as now claimed in amended claim 25, from which dependent claim 29 depends. Thus, the Office's 103(a) rejection of claims 29, which depends from claim 25, must be withdrawn. Similarly, the Office's rejection of claims 30, 32 36 and 39 which all ultimately depend from claim 25 must also be withdrawn.

Other minor changes were made to certain claim terms in claim 25 and in the other pending claims for clarity and consistency only, not for purposes of avoiding or distinguishing the prior art or for any other reason relating to patentability. For example, "lower surface" was replaced with "base" and "inclined downwardly" was replaced with "sloped."

Finally, the Office has yet again failed to even acknowledge the existence of the evidence of secondary considerations of non-obviousness submitted by Applicant on August 5, 2002, which, at that time, was submitted to rebut the Office's obviousness rejections of Applicant's then pending claims. At the present time, because the Office has failed to establish a *prima facie* case of obviousness, Applicant is under no obligation to present evidence of secondary considerations of non-obviousness. S*ee In re Dillon*, , 919 F.2d 688, 701, 16 U.S.P.Q.2d 1897 (Fed. Cir. 1990) (en banc) (Newman, J., dissenting), *cert. denied, sub nom., Dillon v. Manbeck* 500 U.S. 904 (1991) ("[T]he presence or absence of the *prima facie* case of obviousness controls the need for the applicant to adduce rebuttal evidence of unobviousness."). However, because the evidence is already of record, and because Applicant's evidence of secondary considerations of non-obviousness should have been considered over two years ago when originally presented,

Applicant respectfully reminds the Office of its obligation to consider all the evidence made of record in this case when revisiting the allowability of Applicant's claims as amended herein. As held by the Federal Circuit:

> [E]vidence of secondary consideration may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not. It is to be considered as part of all the evidence, not just when the decision-maker remains in doubt after reviewing the art.

Continental Can Co. USA v. Monsanto Co., 948 F.2d 1264, 20 U.S.P.Q.2d 1746, 1752 (Fed. Cir. 1991).

For the foregoing reasons, Applicants respectfully request that a timely notice of allowance be issued in this case for claims 25, 26, 27, 29, 30, 32, 35, 36 and 39. Upon allowance of claim 25, Applicant submits that the restriction requirement with respect to claims 28, 31, 33, 37 should be removed to allow those claims to issue along with claims 25, 26, 27, 29, 30, 32, 35, 36 and 39. Furthermore, Applicant submits that the restriction requirement with respect to method claims 42-48 should also be removed to allow those method claims to issue along with apparatus claims 25-33, 35-37 and 39. Accordingly, Applicant submits that a timely notice of allowance be issued in this case for all pending claims 25-33, 35-37, 39 and 42-48.

Respectfully submitted,
Earl D. Koch

Dated: August 17, 2004

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